FILE COPY

FILED

NOV 7 1972

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1971
No. 71-1465

J. B. ROSENTHAL,

Petitioner,

vs.

ARKANSAS LOUISIANA FINANCE CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

RESPONDENT'S BRIEF IN OPPOSITION.

DONALD F. YOKAITIS,
880 East Colorado Boulevard,
Suite 502,
Pasadena, Calif. 91106,
Attorney for Respondent Arkansas Louisiana Finance Corporation.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement	2
Argument	3
1. Petitioner Has Not, and Did Not, Timely Raise the Issue of Denial of Federal Due Process	3
2. Petitioner Was Not Denied Federal Due Process	5
3. The Cases Cited by Petitioner Are Not Applicable to the Facts of the Present Case	6
Conclusion	7

INDEX TO APPENDICES

Appendix I. Complaint on Foreign Judgment for Money	App. p. 1
Appendix II. Answer to Complaint	3
Appendix III. Proposed First Amended Answer	4
Appendix IV. Amended Proposed First Amended Answer	6
Appendix V. Proposed Findings of Fact and Conclusions of Law	8

TABLE OF AUTHORITIES CITED

Cases	Page
Chapin v. Fulkerson, 24 S.W. 1066, 95 Ky. 277 (1894)	5
Gentry v. U.S., 101 Fed. 51 (8th Cir. 1900)	7
Helvering v. Rubenstein, 124 F.2d 966 (CCA 8, 1942)	4
Hormel v. Helvering, 61 S.Ct. 719, 312 U.S. 552 (1941)	4
Hudson v. Manning, 63 S.W.2d 943, 250 Ky. 760 (1933)	5
Little v. Mann, 195 S.W.2d 321, 302 Ky. 661 (1946)	6
Reynolds v. Stockton, 140 U.S. 254 (1891)	7
Shelley v. Kraemer, 68 S.Ct. 836, 334 U.S. 1	4
Standard Oil Co. v. State of Missouri, 224 U.S. 270 (1911)	7
Sylvan Beach v. Koch, 140 F.2d 852 (1944)	6
Walters v. City of St. Louis, Mo., 74 S.Ct. 505, 347 U.S. 231 (1954)	4
Windsor v. McVeigh, 93 U.S. 274 (1876)	7

IN THE

Supreme Court of the United States

October Term, 1971
No. 71-1465

J. B. ROSENTHAL,

Petitioner,

vs.

ARKANSAS LOUISIANA FINANCE CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

RESPONDENT'S BRIEF IN OPPOSITION.

Opinions Below.

The California Supreme Court denied Petitioner's petition for hearing, without any written opinion (Petitioner's Appendix A).

The opinion of the Court of Appeal of the State of California, Second Appellate District (Petitioner's Appendix B), was certified for nonpublication and not therefore officially reported.

The judgment of the trial court, the Superior Court of the State of California for the County of Los Angeles, Case No. 961867 (Petitioner's Appendix D), was not officially reported. Annexed hereto are the

following documents filed in and a part of Case No. 961867:

1. Complaint—Appendix I.
2. Answer to Complaint—Appendix II.
3. Proposed First Amended Answer—Appendix III.
4. Amended Proposed First Amended Answer—Appendix IV.
5. Findings of Fact and Conclusions of Law—Appendix V.

Jurisdiction.

The alleged basis of jurisdiction, denial of federal due process, is set forth in the petition.

Questions Presented.

1. Whether Petitioner timely raised a federal question of denial of due process.

2. Whether Petitioner was denied federal due process by a Kentucky judgment rendered against him personally.

Statement.

The facts of the case are stated in the decision and opinion of the Court of Appeal of the State of California, Second Appellate District (Petitioner's Appendix B).

ARGUMENT.

Petitioner, a lawyer of many years standing and a resident of the State of California, in the latest and newest of many successive theories, seeks to attack a prior and final Kentucky judgment rendered against him on January 20, 1969, not by direct attack on that Kentucky judgment, which he has never done, but rather by attack upon the California judgment rendered against him on September 2, 1970, and based upon the prior Kentucky judgment.

Petitioner, by his petition to this Court, raises the alleged issue and argument that federal due process was denied to him by the judgment granted by the Kentucky court against him personally as being in excess of the prayer of the complaint which he allegedly relied upon.

1. Petitioner Has Not, and Did Not, Timely Raise the Issue of Denial of Federal Due Process.

A. Petitioner in no way or manner ever raised the due process issue in any of his many verified written answers filed with the California trial court, or in any way or manner ever raised the issue during the trial, or by way of or during his motion for a new trial after the trial court had rendered judgment against him. In fact, and to the very contrary, Petitioner by way of his answers to the complaint filed by Respondent in the California action to all times admitted expressly, and the trial court so found, that a valid Kentucky judgment had been rendered against him. Petitioner contested primarily the two issues as to whether or not the Kentucky judgment was personal against him and the amount owing by him pursuant to the Ken-

tucky judgment. (Respondent's Appendix I, II, III, IV and V).

B. Petitioner in no way or manner ever raised the due process issue in his written briefs filed with or oral argument made to the Appellate Court of the State of California.

C. Petitioner in no way or manner ever, at any time during trial, or in arguments of the California Appellate Court, offered any evidence, written or oral, that he at any time, in any manner, relied upon the prayer of the Kentucky complaint against him.

D. The simple truth of the matter is that Petitioner, on appeal, has developed a late and new theory and approach to the case which was never raised or presented at trial, and therefore the court and the Respondent never addressed themselves to this issue. Ordinarily, an appellate court does not give consideration to issues not raised below except where the obvious result would be a plaint miscarriage of justice. *Hormel v. Helvering*, 61 S.Ct. 719, 312 U.S. 552 (1941). The United States Supreme Court will not undertake to review what the court below did not decide. *Walters v. City of St. Louis, Mo.*, 74 S.Ct. 505, 347 U.S. 231 (1954). Only the constitutional issues raised in the lower courts are before the Supreme Court on appeal. *Shelley v. Kraemer*, 68 S.Ct. 836, 334 U.S. 1. And finally, as stated by the court in *Helvering v. Rubenstein*, 124 F.2d 966 (CCA 8, 1942),

> "The right to disregard the rule that an appellate court will not ordinarily consider issues of law or fact not raised below is a right to prevent a clear miscarriage of justice apparent from the record and not a right to afford a defeated litigant an-

other day in court because he thinks that if he were given another opportunity to try his case again upon a different theory he might prevail."

For this reason alone, Petitioner's failure to timely present the matter for rebuttal, argument and decision at the trial level, Petitioner should be denied the Writ herein petitioned for.

2. Petitioner Was Not Denied Federal Due Process.

A. Petitioner argues denial of federal due process alleging a Kentucky default judgment against him granting different relief than the prayer of the complaint in an action that Petitioner was not personally served with process. Petitioner, in the foregoing argument, ignores the significant facts of the case both in Kentucky and in California. However, the facts, as borne out by the opinion of the California Court of Appeal (Petitioner's Appendix B) and the Findings of Fact by the California trial court (Respondent's Appendix V) reflect the following:

(1) Petitioner entered a general appearance, by way of demurrer to the complaint, in the Kentucky action by and through a Kentucky lawyer who at all times then and thereafter was acting with the express knowledge, authorization and consent of Petitioner and on his behalf. The filing of a demurrer to the petition constitutes an appearance in the action. *Chapin v. Fulkerson*, 24 S.W. 1066, 95 Ky. 277 (1894). Jurisdiction over the person of a defendant may be acquired by service of process or by his voluntary appearance. *Hudson v. Manning*, 63 S.W.2d 943, 250 Ky. 760 (1933).

(2) Petitioner's appearance in the Kentucky action, by way of a demurrer to the complaint, resulted in the exclusion of attorney's fees from the complaint and the judgment thereafter rendered, all of which Petitioner was the beneficiary of.

(3) The Kentucky judgment against petitioner was seen, approved and signed by Petitioner's attorneys in Kentucky prior to its signing and entering by the Kentucky court. (Petitioner's Appendix E). The judgment clearly recited it to be a personal judgment and was not a default judgment in the usual sense, but rather a consent judgment after personal appearance. There was no evidence or argument, written or oral, offered or intimated to the California trial court that Petitioner relied upon the prayer of the Kentucky complaint. It therefore simply doesn't lie in Petitioner's mouth thereafter, for the first time in argument to the United States Supreme Court, to claim and argue that Petitioner relied upon the prayer of the complaint in the Kentucky action.

As the court stated in *Little v. Mann,* 195 S.W.2d 321, 302 Ky. 661 (1946), one may not complain on an appeal of a judgment to which he has consented unless it is on the ground of fraud or mistake.

3. The Cases Cited by Petitioner Are Not Applicable to the Facts of the Present Case.

Each of the cases cited by Petitioner are not applicable to the facts of the present case in that none of the cited cases involved judgment consented to by the defendant. Each of the cited cases involved a true default situation in one form or another. In fact, the court, in the case of *Sylvan Beach v. Koch,* 140 F.2d 852 (1944), cited by Petitioner, which involved a

nonappearance situation and an award in excess of the complaint and prayer, stated "a court may not, without *consent* (emphasis added) of all parties affected, enter a judgment which goes beyond the claim asserted in the pleadings. The case of *Gentry v. U.S.*, 101 Fed. 51 (Eighth Cir. 1900) involved a jury award, after trial, as to an issue not properly before the trier of fact. The case of *Reynolds v. Stockton*, 140 U.S. 254 (1891) involved a case tried, in the absence of one of the answering defendants, where the pleadings were amended during trial and a judgment in excess of the original pleadings was not allowed against the answering defendant who did not appear at the trial. The case of *Standard Oil Co. v. State of Missouri*, 224 U.S. 270 (1911) involved a fine, after trial, which was no part of the issues of the case as pleaded and tried. The Appellate Court affirmed the fine since the statute, under which the case was tried, provided for the fine if the primary issue was found against the party and therefore held that the party was on notice of the issue. The *Windsor v. McVeigh*, 93 U.S. 274 (1876) case involved a case where the defendant's answer to the complaint had been stricken on motion because the defendant was a "rebel" in the Civil War. The appellate court held that this was an excess of jurisdiction to strike the answer.

Conclusion.

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted,

DONALD F. YOKAITIS,
Attorney for Respondent Arkansas Louisiana Finance Corporation.

APPENDIX I.

Complaint on Foreign Judgment for Money.

Superior Court of the State of California, for the County of Los Angeles.

Arkansas Louisiana Finance Corporation, a corporation, Plaintiff, v. J. B. Rosenthal, Defendant. No. 961867.

Filed: Sept. 25, 1969.

Plaintiff complains of Defendant above named and for cause of action alleges as follows:

I

Defendant, J. B. ROSENTHAL, is a resident of the County of Los Angeles, State of California.

II

At all times herein mentioned, the Clark Circuit Court of the State of Kentucky, for the County of Clark, was and now is a court of general jurisdiction.

III

On or about January 20, 1969, a judgment was duly given and made by said Clark Circuit Court in favor of Plaintiff against Defendant J. B. ROSENTHAL. A true and correct copy of said judgment is attached hereto, marked Exhibit "A", and incorporated herein by reference as though fully set forth.

IV

Said judgment, Exhibit "A" herein, has become final, has never been vacated, modified or set aside, and the time for appeal therefrom has expired.

V

By said judgment, Exhibit "A" hereof, it was ordered and adjudged that Defendant J. B. ROSENTHAL pay to Plaintiff the sum of $106,275.96 together with interest thereon at the rate of 7% per annum from December 31, 1967 until paid.

VI

On or about February 20, 1969 an order re sale of equipment was duly given and made by said Clark Circuit Court. A true and correct copy of said order is attached hereto, marked Exhibit "B", and incorporated herein by reference as though fully set forth.

VII

On or about May 22, 1969, an order re approving and confirming report of sale and credit on the default judgment was duly given and made by said Clark Circuit Court. A true and correct copy of said order is attached hereto, marked Exhibit "C", and incorporated herein by reference as though fully set forth. Except for the credit referred to in this paragraph, no part of the judgment referred to in paragraph III of this complaint has been paid.

VIII

There is now due, owing and unpaid from the Defendant, J. B. ROSENTHAL, to Plaintiff on said judgment, the sum of $93,965.12, together with interest thereon at the rate of 7% per annum from May 22, 1969.

WHEREFORE, Plaintiff prays judgment against Defendant J. B. ROSENTHAL as follows:

1. For the principal sum of $93,965.12 together with interest thereon at the rate of 7% per annum from and after May 22, 1969;

2. For Plaintiff's costs of suit herein; and

3. For such other and further relief as the court may deem just and proper.

DATED: September 5, 1969.

/s/ Donald F. Yokaitis
Donald F. Yokaitis
Attorney for Plaintiff

APPENDIX II.

Answer to Complaint.

Superior Court of the State of California, for the County of Los Angeles.

Arkansas Louisiana Finance Corporation, a corporation, Plaintiff, v. J. B. ROSENTHAL, Defendant. No. 961,867.

Filed: Oct. 27, 1969.

Comes now JEROME B. ROSENTHAL, and for answer to plaintiff's complaint on file herein, alleges:

I

Answering Paragraph VII, although this answering defendant has not paid any sums toward the said judgment, he has no way of knowing whether any part of said judgment has been paid, or reduced by virtue of the rights granted to plaintiff under Exhibit "A."

II

Answering Paragraph VIII, although not denying that a judgment was obtained against defendant by plaintiff, he has no information or belief on the specific sum referred to in Paragraph VIII, since it could have been reduced by the right to proceeds granted to plaintiff in Exhibit "A." Therefore, basing his denial thereon, and only on that ground, denies that the particular sum set forth in Paragraph VIII, i. e., $93,-965.12, is due.

WHEREFORE, defendant admits that judgment has obtained against him as set forth in the complaint, he prays for a determination by this Court of the exact amount due from him to the plaintiff.

DATED: October 23, 1969.

ROSENTHAL AND LEON

/s/ Gerald Krupp

Gerald Krupp

OMITTING HEREFROM PROOF OF SERVICE.

APPENDIX III.

Proposed First Amended Answer.

Superior Court of the State of California, for the County of Los Angeles.

Arkansas Louisiana Finance Corporation, a corporation, Plaintiff, vs. J. B. Rosenthal, Defendant. No. 961867.

Filed: Feb. 9 ,1970.

COMES NOW Jerome B. Rosenthal, sued herein as J. B. Rosenthal, and for First Amended Answer to plaintiff's Complaint on file herein, alleges:

I

Answering paragraph VIII, defendant denies owing the sum of $93,965.12 or any other sum or sums or at all.

FOR A FIRST SEPARATE AND AFFIRMATIVE DEFENSE DEFENDANT ALLEGES:

II

That plaintiff's attempt to obtain a personal judgment against this defendant is barred by the provisions of California Code of Civil Procedure §580(b).

FOR A SECOND SEPARATE AND AFFIRMATIVE DEFENSE DEFENDANT ALLEGES:

III

That plaintiff's attempt to obtain a personal judgment against this defendant is barred by the provisions of California Code of Civil Procedure §580(d).

WHEREFORE, this defendant prays that plaintiff take nothing by its complaint; that it be dismissed;

and for costs of suit and for such other relief as appears just.

DATED: February 9, 1970.

ROSENTHAL AND LEON

/s/ By Jerome B. Rosenthal

Jerome B. Rosenthal

OMITTING HEREFROM PROOF OF SERVICE.

APPENDIX IV.

Amended Proposed First Amended Answer.

Superior Court of the State of California, for the County of Los Angeles.

Arkansas Louisiana Finance Corporation, a corporation, Plaintiff, vs. J. B. Rosenthal, Defendant. No. 961867.

COMES NOW Jerome B. Rosenthal, sued herein as J. B. Rosenthal, and for First Amended Answer to plaintiff's Complaint on file herein, alleges:

I

Answering paragraph VIII, defendant denies owing the sum of $93,965.12 or any other sum or sums or at all.

FOR A FIRST SEPARATE AND AFFIRMATIVE DEFENSE DEFENDANT ALLEGES:

II

That plaintiff's attempt to obtain a personal judgment against this defendant is barred by the provisions of California Code of Civil Procedure §580(b).

FOR A SECOND SEPARATE AND AFFIRMATIVE DEFENDANT ALLEGES:

III

That plaintiff's attempt to obtain a personal judgment against this defendant is barred by the provisions of California Code of Civil Procedure §580 (d).

FOR A THIRD SEPARATE AND AFFIRMATIVE DEFENSE, DEFENDANT ALLEGES:

IV

That the Kentucky Court rendering the judgment referred to in plaintiff's Complaint lacked the juris-

diction over the person of this answering defendant, necessary for the entry of a valid in personam judgment against this defendant. Hence the purported in personam judgment is invalid and void.

FOR A FOURTH SEPARATE AND AFFIRMATIVE DEFENSE, DEFENDANT ALLEGES:

V

That the Kentucky Court rendering the judgment referred to in plaintiff's Complaint exceeded its jurisdiction in purporting to render judgment against this defendant for any amount in excess of the value or proceeds of the security in the transaction.

WHEREFORE, this defendant prays that plaintiff take nothing by its Complaint; that it be dismissed; and for costs of suit and for such other relief as appears just.

DATED: February 18, 1970.

ROSENTHAL AND LEON
/s/ By Jerome B. Rosenthal
Jerome B. Rosenthal

OMITTING HEREFROM PROOF OF SERVICE.

APPENDIX V.

Proposed Findings of Fact and Conclusions of Law.

Superior Court of the State of California, For the County of Los Angeles.

Arkansas Louisiana Finance Corporation, a corporation, Plaintiff, vs. J. B. Rosenthal, Defendant. No. 961867.

Filed: Sept. 2, 1970.

The above entitled action came on regularly for trial on July 22, 1970 in Department 35 of the above entitled court, the Honorable Emil Gumpert, Judge presiding without a jury, and was regularly tried on said date and on July 23, 1970. Plaintiff appeared by Donald F. Yokaitis, Esq. and Defendant appeared by Rosenthal & Leon, Attorneys At Law by Jerome B. Rosenthal, Esq.

The court having heard the oral testimony and examined the documentary evidence introduced by the parties, the cause having been submitted for decision and the court, after hearing arguments of counsel reading the Points and Authorities of counsel, being fully advised in the matter, the court having announced its intended decision in favor of Plaintiff and against Defendant, J. B. Rosenthal, now makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

I

The allegations contained in Paragraphs I, II, III, IV, V, VI and VII of the complaint are true.

II

The allegations contained in Paragraphs II, III, IV and V of the amended first amended answer dated February 18, 1970 are not true.

III

The judgment duly given and made by the Clark Circuit Court, State of Kentucky, dated January 20, 1969, case No. 11463, in favor of Plaintiff, Arkansas Louisiana Finance Corporation, a corporation, herein called Plaintiff, and against Defendant, J. B. Rosenthal, also known as Jerome B. Rosenthal, herein called Defendant, was and is a valid in personam judgment against Defendant and said court, in said case, had, at all times from and after February 27, 1968, personal jurisdiction over the person of Defendant.

IV

The judgment referred to in Finding No. III did not exceed the jurisdiction of the court rendering same, but rather was within the jurisdiction of said court.

V

The said Clark Circuit Court, State of Kentucky, in said case number 11463, acquired in personam jurisdiction over the person of Defendant on or about February 27, 1968 when the Defendant, by and through his attorneys at law, White, McCann & Stewart by Marshall McCann, Jr., filed a written motion with said court which constituted a general appearance in case number 11463 on behalf of Defendant.

VI

At all times from and after February 27, 1968, Attorneys At Law, White, McCann & Stewart by Marshall McCann, Jr. acted as attorneys at law on behalf of Defendant in case number 11463 with the express and implied authorization of Defendant to so act and all of said acts by said attorneys were from time to time between February 27, 1968 and November 3, 1969, confirmed, ratified, acknowledged and consented to by Defendant without any protest or reservation whatsoever.

VII

There is now due, owing and unpaid from Defendant to Plaintiff on said Kentucky judgment, after deduction of all credits, the principal sum of $93,190.58 plus interest thereon at the rate of 7% per annum from May 22, 1969.

VIII

Except as specifically found herein, all of the allegations of the complaint are true and none of the allegations and denials of the answer are true.

IX

In the event that it claimed or held that any of the following Conclusions of Law be Findings of Fact, they are incorporated herein, hereat, verbatim.

CONCLUSIONS OF LAW

From its Findings of Fact, the court makes the following Conclusions of Law:

I

In the event that it is claimed or held that any of the foregoing Findings of Fact are Conclusions of Law, they are incorporated herein, hereat, verbatim.

II

The judgment duly given and made by the Clark Circuit Court, State of Kentucky, dated January 20, 1969, case number 11463, in favor of Plaintiff and against Defendant is entitled to and hereby is accorded full faith and credit in the present action.

III

The defenses pled by Defendant in Paragraphs II and III of the amended first amended answer dated February 18, 1970 are not permitted defenses in the herein action which is based upon the judgment rendered in the prior Kentucky action.

IV

Plaintiff, Arkansas Louisiana Finance Corporation, a corporation, is entitled to judgment against Defendant, J. B. Rosenthal, also known as Jerome B. Rosenthal, in the principal sum of $93,190.58 together with interest thereon at the rate of 7% per annum from May 22, 1969.

V

Plaintiff shall have its costs of suit herein.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: September 2, 1970.

/s/ Emil Gumpert,
Emil Gumpert, Judge
Superior Court

OMITTING HEREFROM PROOF OF SERVICE.